

No. 16031 ✓

United States
Court of Appeals
for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

EARL R. WILKINSON and GRAYCE WIL-
KINSON, Respondents.

Transcript of Record

Petition to Review a Decision of The Tax
Court of the United States

FILED

AUG -- 4 1958

PAUL P. O'BRIEN, CLERK



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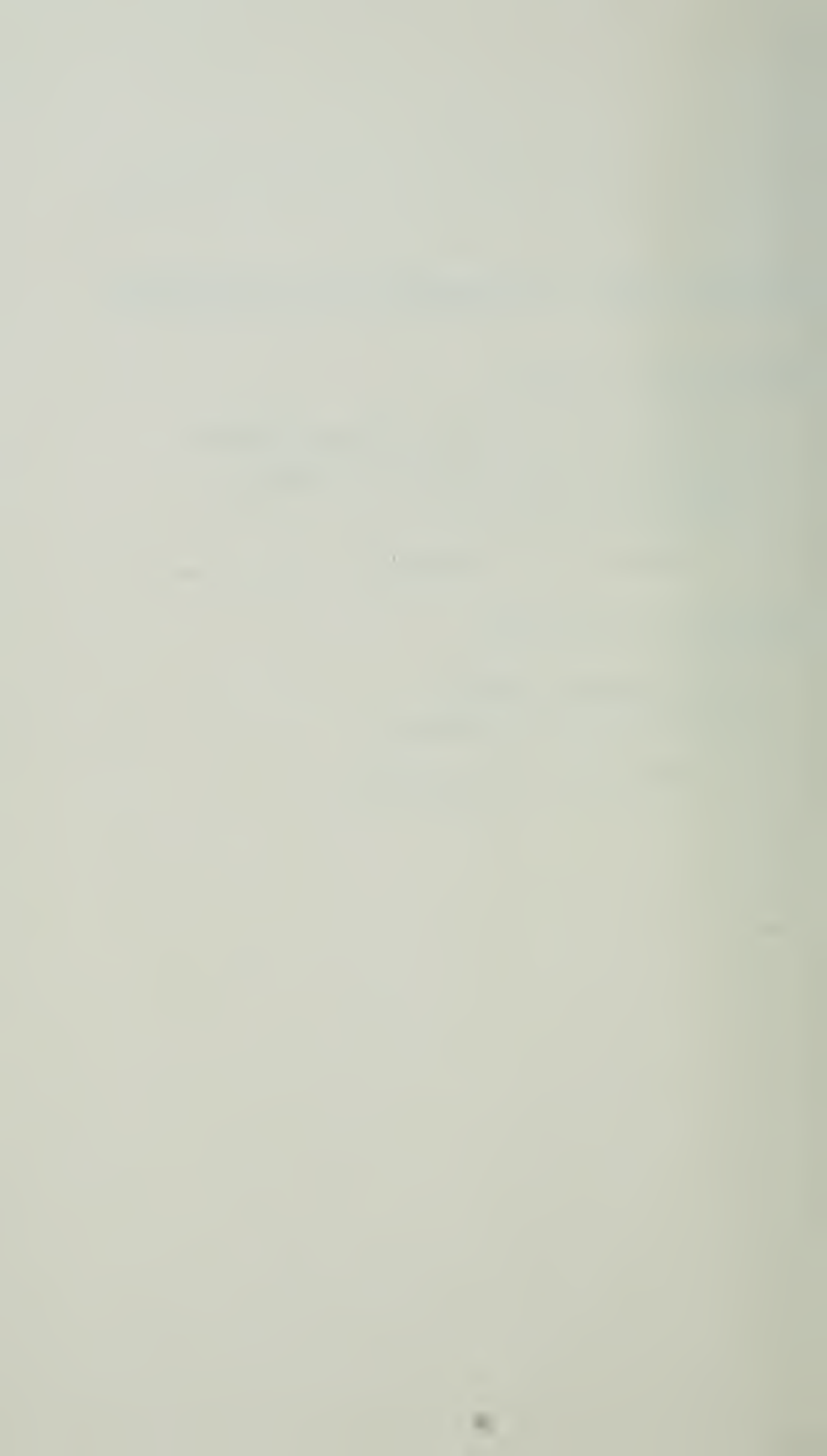
Petition to Review a Decision of The Tax
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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The Tax Court of the United States

Docket No. 61977

EARL R. WILKINSON and GRAYCE WILKINSON,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1956

Apr. 25—Petition received and filed. Taxpayer notified. Fee paid.

Apr. 25—Copy of petition served on General Counsel. Served 4/27/56.

Jun. 20—Answer filed by Respondent.

Jun. 20—Request for hearing in Portland, Oregon filed by respondent. 6/21/56—Granted.

Nov. 26—Hearing set Feb. 18, 1957, Portland, Oregon.

Nov. 29—Motion to place case on the next Portland, Oregon calendar, filed by petitioner. 11/29/56 Granted to 2/18/57.

Nov. 30—Motion of Nov. 29 served.

1957

Feb. 4—Hearing set Feb. 19, 1957—Portland, Oregon—revised as to trial date.

Feb. 19—Trial had before Judge Withey on respondent's motion to file amended answer — Granted — Stipulation of Facts. Respondent's motion (served) and amended answer (served) filed at hearing. Briefs due 4/22/57; Replies due 5/22/57.

4 *Commissioner of Internal Revenue vs.*

1957

Mar. 11—Brief filed by petitioner. Served 6/21/57.

Apr. 8—Transcript of Hearing 2/19/57 filed.

Apr. 18—Motion for extension of time to June 10, 1957 to file brief, filed by Respondent. Granted 4/22/57. Served 4/25/57.

Jun. 10—Motion for extension of time to June 21, 1957 to file brief, filed by respondent. 6/11/57—Granted. Served 6/14/57.

Jun. 20—Brief for respondent filed. Served 6/21/57.

July 8—Reply brief filed by petitioner. Served 7/23/57.

Sep. 5—Reassigned from Judge Withey to Judge Mulroney.

Dec. 6—Opinion filed. Judge Mulroney. Decision will be entered for the petitioners. Served 12/6/57.

Dec. 6—Decision entered, Judge Mulroney. Served 12/10/57.

1958

Mar. 3—Petition for review by U. S. Court of Appeals, 9th Circuit filed by respondent.

Mar. 27—Respondent's motion to extend time for filing record on review and docketing petition for review to June 1, 1958.

Mar. 27—Order extending time for filing record on review and docketing petition for review to June 1, 1958, entered.

May 13—Proof of service of petition for review filed. (Counsel.)

1958

May 13—Proof of service of petition for review filed. (Taxpayers.)

May 13—Statement of Points with proof of service thereon.

May 13—Designation of contents of record on review with proof of service thereon, filed.

[Title of Tax Court and Cause.]

PETITION

The above-named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (A:R:90D:ENH:ew) dated March 14, 1956, and as a basis of their proceeding allege as follows:

(1) The petitioners are individuals and are husband and wife, with residence at 4535 S.W. 78th Avenue, Portland 1, Oregon. The return for the period here involved was a joint return and was filed with the District Director of Internal Revenue for the district of Portland, Oregon.

(2) The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioners on March 14, 1956.

(3) The deficiency as determined by the Commissioner is in income taxes for the calendar year 1953 in the amount of \$109.38, all of which is in dispute.

(4) The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in determining that

the reorganization whereunder the First National Bank of Portland created a trust and transferred thereto its holdings of the capital stock of First Securities Company, constituted a dividend distribution to the stockholders of said Bank.

(b) The Commissioner erred in determining that said reorganization transaction constituted a dividend distribution of First Securities Company stock, in kind, by the First National Bank of Portland to its stockholders.

(c) The Commissioner erred in determining that the Petitioners received stock of First Securities Company from the First National Bank of Portland.

(d) The Commissioner erred in determining that the Petitioners received any dividend distributions from the First National Bank of Portland in 1953 in excess of the cash dividends of \$1,764.80.

(e) The Commissioner erred in determining that the fair market value of all the outstanding capital stock of the First Securities Company on January 20, 1953 was \$350,000.

(f) The Commissioner erred in failing to determine that the said reorganization transaction was non-taxable within the provisions of Section 112 (b)(11) of the Internal Revenue Code of 1939.

(g) The Commissioner erred in failing to determine that the said reorganization transaction was non-taxable within the provisions of Section 112 (g)(1)E or Section 112(g)(1)(F) of the Internal Revenue Code of 1939.

(h) The Commissioner erred in failing to determine that the beneficial interests in First Securities Company stock had no fair market value on January 20, 1953.

(i) The Commissioner erred in failing to determine that the stock of First Securities Company had no fair market value on January 20, 1953.

(5) The facts upon which the petitioner relies as a basis of this proceeding are as follows:

(a) On January 20, 1953 petitioners were the owners of 1,103 shares of the outstanding capital stock of The First National Bank of Portland.

(b) The First National Bank of Portland is a national banking association with principal office located in Portland, Oregon. On January 20, 1953 it had 1,200,000 shares of its capital stock outstanding.

(c) On January 20, 1953 and for several years prior thereto, The First National Bank of Portland was the owner of all the outstanding capital stock of First Securities Company.

(d) First Securities Company is an Oregon corporation with principal office in Portland, Oregon. The business of First Securities Company consisted of assisting the said Bank by performing certain functions in behalf of said Bank and also of making of investments in various types of property. On January 20, 1953 First Securities Company had 500 shares of its capital stock outstanding.

(e) Prior to January 20, 1953 the United States Comptroller of the Currency had expressed criti-

cism of the ownership of the stock of said First Securities Company by said First National Bank of Portland.

(f) In order to satisfy the criticism of the said Comptroller of the Currency the said First National Bank of Portland proposed a reorganization plan whereby:

1. It would create a trust with its own officers as trustees, to be administered for the benefit of all of its shareholders, ratably in the same proportions as they shall from time to time own of record stock of the Bank, and

2. It would transfer the said stock of First Securities Company to said Trust.

(g) On January 20, 1953 the said reorganization plan was approved by the stockholders of the said First National Bank of Portland.

(h) On January 20, 1953 the said reorganization plan was made effective by action of the Board of Directors of said First National Bank of Portland. On said day the said Bank created the Trust as required by said reorganization plan. On said day the said Bank transferred to said trust all of the 500 outstanding shares of the capital stock of First Securities Company.

(i) No certificates or other papers were distributed to the stockholders of said Bank evidencing their beneficial interest in the stock of the First Securities Company and nothing was received by them with respect to said beneficial interest which could be disposed of by them separately from the

stock of the First National Bank of Portland owned by them. No notation was made upon, or appears upon, the Bank stock certificate to indicate that the certificate also represented a beneficial interest in the stock of said Company.

(j) Under and by virtue of said reorganization plan the stock of the said First National Bank of Portland and the beneficial interests in the First Securities Company stock may not be transferred separately; and if and when any shares of stock of the said Bank are transferred the pro rata interest of the stockholders of the said Bank in the stock of the said Company, to the extent of the shares so transferred, will automatically be transferred along with the transfer of the Bank stock without the execution of any separate papers.

(k) The Respondent has determined that under the said reorganization plan the petitioners received on January 20, 1953 a dividend in kind measured by the fair market value of the First Securities Company stock on that date, and determined further that the value of said dividend was \$321.71.

(l) The Respondent erred in determining that petitioners received First Securities Company stock, and erred further in determining that Petitioner received a dividend of any amount as the result of the said reorganization plan, or received a dividend at all in the said reorganization transaction.

(m) The beneficial interests in the First Securities Company stock had no fair market value on January 20, 1953.

(n) Petitioners received nothing of value as the result of the said reorganization transaction on January 20, 1953. Petitioners' proprietary position as a stockholder of the said First National Bank of Portland, and the value thereof, remained the same after the said reorganization transaction as before. Said reorganization transaction effected a mere change of form in the relationship between The First National Bank of Portland and the First Securities Company, and was merely a form of recapitalization of The First National Bank of Portland, and did not sever the petitioners' unit investment in the said Bank and the said Company.

(o) Respondent has determined that "there has been no trading in the stock of the First Securities Company, and no actual market value has been established" and thereupon determined that "an adjusted book value has been used to establish the value at the date of distribution" to be \$350,000.00.

(p) The Respondent erred in determining that the said outstanding stock of First Securities Company had a fair market value of \$350,000 on January 20, 1953. Said stock had no fair market value on January 20, 1953.

Wherefore, the Petitioner prays that the Court may hear the proceeding and eliminate the proposed deficiency and for such other and further relief as the Court may deem proper.

/s/ GEORGE H. KOSTER,
Counsel for Petitioner.

Duly Verified.

EXHIBIT "A"

(Copy)

U. S. Treasury Department
Internal Revenue Service
District Director
830 N. E. Holladay Street
Portland 14, Oregon

March 14, 1956

In replying refer to:

A:R:90D:ENH:ew

Mr. Earl R. Wilkinson and
Mrs. Grayce Wilkinson
Husband and Wife
4535 S. W. 78th Avenue
Portland 1, Oregon

Dear Mr. and Mrs. Wilkinson:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1953 disclosed a deficiency of \$109.38 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with the Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days, you may not exclude any day unless the 90th day is a Saturday, Sunday or legal holiday in the District of Colum-

Exhibit "A"—(Continued)

bia, in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to District Director of Internal Revenue, Chief, Audit Division, 830 N.E. Holladay Street, Portland 14, Oregon. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

RUSSELL C. HARRINGTON,
Commissioner,

By /s/ R. C. GRANQUIST,
R. C. Granquist,
District Director.

Enclosures:

Statement

Form 160

Agreement Form

1230-A.

Exhibit "A"—(Continued)

STATEMENT

Mr. Earl R. Wilkinson and Mrs. Grayce Wilkinson

Husband and Wife

4535 S. W. 78th Avenue

Portland 1, Oregon

Tax liability for the taxable year ended December 31, 1953.

	Deficiency
Income tax	\$109.38

This determination of your income tax liability has been made upon the basis of information on file with the Internal Revenue Service.

Adjustments to Income

Net income as disclosed by return.....	\$14,815.30
--	-------------

Unallowable deductions and additional income:	
---	--

(a) Dividends	321.71
---------------------	--------

	\$15,137.01
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Explanation of Adjustments

(a) It has been determined that the dividends paid in 1953 by The First National Bank of Portland, Oregon, in stock of the First Securities Company constituted a taxable dividend computed as follows:

Dividends paid in cash	\$1.60	per share
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Dividend paid in stock of First Securities Co.29167	per share
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Total dividends paid in 1953	\$1.89167	per share
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Since you owned 1103 shares your taxable dividend is determined to be:

1103 shares x \$1.89167	\$2,086.51
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Less reported in your return	1,764.80
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Increase in taxable dividend of	\$ 321.71
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Computation of Tax

Net income as adjusted	\$15,137.01
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Less: Exemption 3 x \$600.00	1,800.00
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Income subject to tax	\$13,337.01
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Exhibit "A"—(Continued)

Income tax liability	\$3,486.58
Income tax liability disclosed by return	3,377.20
	<hr/>
Deficiency of income tax	\$ 109.38

Served and Entered April 27, 1956.

[Endorsed]: T.C.U.S. Filed April 25, 1956.

[Title of Tax Court and Cause.]

ANSWER

Comes Now the Commissioner of Internal Revenue, by his attorney, John Potts Barnes, Chief Counsel, Internal Revenue Service, and for answer to the petition filed herein, admits and denies as follows:

1. Admits the allegations contains in paragraph 1 of the petition.
2. Admits the allegations contained in paragraph 2 of the petition.
3. Admits the allegations contained in paragraph 3 of the petition.
4. Denies that he erred in his determination of the deficiency in income tax as shown by the notice of deficiency from which the appeal is taken. Specifically denies that he erred in the manner and form as alleged in paragraph 4(a) to (i), inclusive, of the petition.
5. (a) Admits the allegations contained in paragraph 5(a) of the petition.

(b) Admits the allegations contained in the first sentence, ending with the words "Portland, Oregon", of paragraph 5(b) of the petition. For lack

of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the remaining allegations contained in said subparagraph.

(c) For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the allegations contained in paragraph 5(c) of the petition.

(d) Admits the allegations contained in the first sentence, ending with the words "Portland, Oregon", of paragraph 5(d) of the petition. For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the remaining allegations contained in said subparagraph.

(e) For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the allegations contained in paragraph 5(e) of the petition.

(f) Admits that the First National Bank of Portland proposed a reorganization plan. For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the remaining allegations contained in paragraph 5(f) of the petition.

(g) Admits the allegations contained in paragraph 5(g) of the petition.

(h) Admits the allegations contained in the first sentence, ending with the words "Bank of Portland", of paragraph 5(h) of the petition. For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth

or falsity thereof, denies the remaining allegations contained in said subparagraph.

(i) and (j) For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the allegations contained in paragraph 5(i) and (j) of the petition.

(k) Admits the allegations contained in paragraph 5(k) of the petition.

(l), (m) and (n) Denies the allegations contained in paragraph 5(l), (m) and (n) of the petition.

(o) Admits the allegations contained in paragraph 5(o) of the petition.

(p) Denies the allegations contained in paragraph 5(p) of the petition.

6. Denies generally and specifically each and every material allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the petitioners' appeal be denied and that the Commissioner's determination of the deficiency be approved.

/s/ JOHN POTTS BARNES, JHP,
Chief Counsel,
Internal Revenue Service.

Of Counsel: Melvin L. Sears, Regional Counsel,
John H. Pigg, Assistant Regional Counsel,
Internal Revenue Service.

Served and Entered June 22, 1956.

[Endorsed]: T.C.U.S. Filed June 20, 1956.

[Title of Tax Court and Cause.]

AMENDED ANSWER

Comes Now the Commissioner of Internal Revenue, by his attorney, Herman T. Reiling, Acting Chief Counsel, Internal Revenue Service, and for amended answer to the petition filed herein, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4. Denies that he erred in his determination of the deficiency in income tax as shown by the notice of deficiency from which the appeal is taken. Specifically denies that he erred in the manner and form as alleged in paragraph 4(a) to (i), inclusive, of the petition.

5. (a) Admits the allegations contained in paragraph 5(a) of the petition.

(b) Admits the allegations contained in the first sentence, ending with the words "Portland, Oregon", of paragraph 5(b) of the petition. For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the remaining allegations contained in said subparagraph.

(c) For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the allegations contained in paragraph 5(c) of the petition.

(d) Admits the allegations contained in the first sentence, ending with the words "Portland, Oregon", of paragraph 5(d) of the petition. For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the remaining allegations contained in said subparagraph.

(e) For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the allegations contained in paragraph 5(e) of the petition.

(f) Admits that the First National Bank of Portland proposed a so-called reorganization plan. Denies the remaining allegations contained in paragraph 5(f) of the petition. Alleges that said plan did not provide for a reorganization within the meaning of section 112(g) of the 1939 Code.

(g) Admits that on January 20, 1953 the said so-called reorganization plan was approved by the stockholders of the First National Bank of Portland.

(h) Admits that on January 20, 1953, the said so-called reorganization plan was made effective by action of the Board of Directors of the First National Bank of Portland. Denies the remain-

ing allegations contained in paragraph 5(h) of the petition.

(i) and (j) For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the allegations contained in paragraph 5(i) and (j) of the petition.

(k) Admits that the respondent has determined that under the so-called reorganization plan the petitioners received on January 20, 1953 a dividend in kind measured by the fair market value of the First Securities Company stock on that date, and determined further that the value of said dividend was \$321.71.

(l), (m) and (n) Denies the allegations contained in paragraph 5(l), (m) and (n) of the petition.

(o) For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the allegations contained in paragraph 5(o) of the petition.

(p) Denies the allegations contained in paragraph 5(p) of the petition.

6. Denies generally and specifically each and every material allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the petitioners' ap-

peal be denied and that the Commissioner's determination of the deficiency be approved.

/s/ HERMAN T. REILING,
Acting Chief Counsel,
Internal Revenue Service.

Of Counsel: Melvin L. Sears, Regional Counsel,
John D. Picco, Special Attorney, John H.
Pigg, Assistant Regional Counsel, Internal
Revenue Service.

Served: 2/19/57.

[Endorsed]: T.C.U.S. Filed February 19, 1957.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto through their respective counsel that in addition to the facts admitted by the pleadings, the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the rights of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

1. The petitioners Earl R. Wilkinson and Grayce E. Wilkinson are husband and wife residing at 4911 S. W. Broadmoor Drive, Portland, Oregon. During the taxable year 1953 the petitioner Earl R. Wilkinson was an employee and stockholder of the First National Bank of Portland and benefi-

ciary of a trust more fully described below. Petitioners filed a joint income tax return for the taxable year 1953 with the Director of Internal Revenue at Portland, Oregon.

2. The First National Bank of Portland was organized September 8, 1865. On January 20, 1953 it had 1,200,000 shares of its capital stock outstanding.

3. The First Securities Company was incorporated April 7, 1919. On January 20, 1953 it had 500 shares of capital stock outstanding. The capital stock of this Company has for over twenty years up to the time of the transaction in issue in this proceeding been owned by The First National Bank of Portland. Because of changes in the National Banking Act and the rules and requirements of the Comptroller of the Currency whereby national banks are restricted in regard to the extent and manner in which they may deal in investment securities, and the acquisition of stock in other corporations for their own accounts, it became necessary for The First National Bank of Portland to eliminate the stock of The First Securities Company from its assets.

4. Exhibit 1-A and its supporting Schedules A and B attached hereto are correct statements of the assets and liabilities of The First Securities Company on January 20, 1953 as shown by the books of the Company.

5. The fair market value of the net assets of The First Securities Company on January 20,

1953 was \$310,000.00. The respondent based his determination of the fair market value of The First Securities Company stock on the adjusted book value of the assets of the Company which he computed to be \$350,000.00. The correct adjusted book value of said assets on January 20, 1953, was \$310,000.00.

6. Exhibits 2-B and 3-C attached hereto are correct statements of the income and expenses and surplus of The First Securities Company for the calendar years 1951, 1952 and 1953, and balance sheets of said Company as of December 31, 1950, 1951, 1952, and 1953, respectively, as shown by the books of the Company.

7. Exhibits 4-D and 5-E attached hereto are Annual Reports to stockholders of The First National Bank of Portland as of December 31, 1952 and December 31, 1953, respectively, containing financial statements of said Bank for said years as shown by its books.

8. Exhibit 6-F attached hereto is a copy of the Form 1096 filed by The First National Bank of Portland in reporting to the Commissioner of Internal Revenue payments made by it in the year 1953.

9. The ruling published as Revenue Ruling 54-140 in CB 1954-1, page 116, is the ruling made by respondent as to the particular transaction involved in this case.

10. Exhibit 7-G attached hereto contains the daily bid and ask prices per share for The First

National Bank of Portland stock on the over-the-counter market during the period December 1, 1952, to April 1, 1953.

11. On January 20, 1953 a regular annual meeting of the shareholders of The First National Bank of Portland was held, at Portland, Oregon. A copy of the notice of said meeting, dated December 19, 1953, is attached hereto as Exhibit 8-H. With the said notice there was mailed to said shareholders a letter to said shareholders signed by F. N. Belgrano, Jr., President of said bank, and dated December 19, 1952, copy of which letter is attached hereto as Exhibit 9-I, which letter explains the purposes of and the reasons for the proposal to be submitted to the shareholders with respect to The First Securities Company stock.

12. At the said meeting, the shareholders took action as recorded in the excerpt from the minutes of said meeting attached hereto as Exhibit 10-J.

13. The Board of Directors of said bank held a meeting immediately following said shareholders' meeting and took action as recorded in the excerpt from the minutes of said meeting attached hereto as Exhibit 11-K.

14. Pursuant to the action taken by the shareholders and the Board of Directors, as aforesaid, the agreement of January 20, 1953 attached hereto as Exhibit 12-L was executed by the parties thereto, and on January 20, 1953, The First National Bank of Portland transferred the stock of The First

Securities Company to the trust created under said agreement.

15. No papers were distributed to the stockholders of The First National Bank of Portland evidencing their beneficial interest in the stock of The First Securities Company. The stockholders received nothing they could dispose of separately from the bank stock. No notation was made on the bank stock certificates evidencing beneficial interest in the stock of The First Securities Company.

16. The earnings and profits of The First National Bank of Portland during the taxable year 1953 exceeded \$350,000.00.

17. Exhibit 13-M attached hereto is a photostat copy of petitioners' joint income tax return for 1953.

18. Exhibits 14-N and 15-O attached hereto are photostat copies of the corporate income tax returns of The First Securities Company for 1952 and 1953.

19. The attached exhibits shall be considered as having been offered and received in evidence in this proceeding unless objection is made thereto and the objection is sustained.

/s/ GEORGE H. KOSTER,
Counsel for Petitioners.

/s/ HERMAN T. REILING,
Acting Chief Counsel, Internal Revenue Service,
Counsel for Respondent.

[Endorsed]: T.C.U.S. Filed February 19, 1957.

[Title of Tax Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

U. S. Court of Appeals, U. S. Court House (New), Portland, Oregon. Tuesday, February 19, 1957.

The above-entitled matter came on for hearing, pursuant to Calendar Call, at 11:25 o'clock a.m.

Before: The Honorable Graydon G. Withey.

Appearances: George H. Koster, 300 Montgomery Street, San Francisco, California, on behalf of the Petitioner. John D. Picco, on behalf of the Respondent. [1]*

The Court: Now we will take 61977, the Wilkinson case. State your appearances, gentlemen.

Mr. Koster: George Koster, your Honor, appearing for the Petitioner.

Mr. Picco: John D. Picco, for the Respondent.

The Court: This is not a fraud case, I take it?

Mr. Picco: That is correct, it is not a fraud case. Before Petitioner goes on with his opening statement, we have found it necessary, right close to the end here, to amend our answer, to deny what inadvertently was admitted. There is no objection to that, since all the facts are stipulated anyway, and Respondent asks leave—in fact, they have a written motion for leave to file the amended answer at this time.

The Court: Is there an objection?

Mr. Koster: No objection.

* Page numbers appearing at top of page of Reporter's Transcript of Record.

The Court: It may be received.

Mr. Picco: And the motion is here—— (interrupted).

The Court: And the motion granted.

Mr. Picco: Copies have been turned over to Petitioner—— (interrupted).

The Court: All right. Do you have a stipulation of fact?

Mr. Picco: That is correct. I might put that in at the present time. The parties also ask leave to file the [2] complete stipulation of facts, your Honor.

The Court: And the last exhibit number?

Mr. Picco: 15-O—they are all joint exhibits.

The Court: I understand this is a joint motion to—— (interrupted).

Mr. Koster: Joint motion, your Honor.

The Court: The stipulation of facts, with the designated exhibits is received. I will now hear from Petitioner.

Mr. Koster: Your Honor, this case involves a proposed deficiency of one hundred and nine dollars and thirty-eight cents against Petitioner for the calendar year 1953. The deficiency results from the inclusion in Petitioner's taxable income by the Respondent of an amount of three hundred and twenty-one dollars and seventy-one cents, which he determined or asserts was the value of a dividend which this Petitioner received from the First National Bank of Portland, of which he was a stockholder. This case, your Honor, is representative of

a great many cases involving the tax liabilities of stockholders of this bank for the year 1953.

The facts will show that the First National Bank of Portland is a national banking association, has its principal office here in Portland, and does a banking business throughout the State of Oregon. For many years, it owned all of the five hundred outstanding shares of an Oregon corporation, known as The First Securities Company. The First Securities Company [3] acted as an auxiliary to the bank, and performed various functions which the bank itself could not do under the banking laws; for example, it would acquire and rent residences to employees of the bank in the localities where it was difficult to get adequate housing accommodations, and would take over various types of assets which the bank acquired through foreclosure of loans and which the bank could not retain long enough to liquidate them out because of the restrictions of the banking law, and functions of that sort.

Just prior to 1953, the United States Comptroller of the Currency, who has regulatory authority over national banks, concluded that the bank could not have these types of functions performed through a wholly owned subsidiary, and thereupon required that the bank dispose of its investment in The First Securities Company. The bank wanted to retain this medium for the uses that I have just described, and so devised a plan of reorganization, so-called, which would not only meet the requirements of the Comptroller of the Currency, but would also attain the bank's objectives to have this medium available.

Under this plan of reorganization, the bank proposed to declare as a dividend in kind, the investment in The First Securities Company, such distribution, however, to be made not to the stockholders of the bank—persons who held the one million two hundred thousand outstanding shares of stock of the bank, but to a trust which would be created for the purpose of [4] acquiring this stock for the benefit of the stockholders of the bank, as their interests might from time to time appear.

The shareholders of the bank, at a meeting on January 20th, 1953, approved that plan. As a result of that action, this Petitioner acquired a point four five nine five eight three and a third of a beneficial interest in the trust which acquired the stock of the bank—stock of the company. I might say that immediately after this action by the stockholders, the trust was created on January 20th, 1953, and the bank made a direct transfer of The First Securities' stock from itself to the trust. Now, in connection with that transaction, there were no certificates or no documents of any kind that were given to the shareholders—there was nothing which they received which they could dispose of separate and apart from the disposition of the stock of the bank which they owned. Now, as I say, as a result of this transaction, this Petitioner received this fractional beneficial interest in this trust, as an attribute of the eleven hundred and three shares of the First National Bank stock which he owned.

The Commissioner has determined that in effect, what this taxpayer received was a point four five nine five eight three and a third of a share of stock

of the First Securities Company, of a value of three hundred and twenty-one dollars and seventy-one cents, which the Commissioner then concludes and determines was a taxable dividend. Now, that value of three [5] twenty-one seventy-one was based on the adjusted book value of the assets of The First Securities Company, which the Commissioner computed at three hundred and fifty thousand dollars. In the stipulation of facts, it is now conceded that the correct adjusted book value and the fair market value of the assets of that company aggregated three hundred and ten thousand dollars. Now, the principal contentions of the Petitioner in this matter are these:

First, the commission to the Petitioner contends that this transaction was not a closed and completed transaction which had tax significance.

The Court: Which transaction?

Mr. Koster: The transaction of January 20th, 1953, involving the transfer of The First Securities Company stock to the trust and the receipt by the shareholders of a beneficial interest in that trust. We contend that that was not a closed and completed transaction of any tax significance, because there was no severance or change in substance in the Petitioner's unit investment in the stock of the bank and the stock of The First Securities Company. Secondly, we contend that the Petitioner received nothing of a fair market value as a result of this transaction. What the Petitioner received was a beneficial interest in this trust, but he received no document or tangible paper of any kind

which he could assign or transfer separate and apart from the bank stock which he owned. So, [6] with the beneficial interest of this type— (interrupted).

The Court: May I stop you right there for just a minute. Is it your contention that regardless of the question of whether he received a tangible paper, is it your contention that he received no beneficial right or property right by that transaction, which he could dispose of?

Mr. Koster: That is correct, your Honor, which he could dispose of.

The Court: All right.

Mr. Koster: And that the restrictions with respect to the control and disposition of that were of such nature that it had no fair market value and whether this be treated as a dividend or not, he received nothing of value, and therefore realized no taxable income.

Now, we also have a third contention, and that is this, that this transaction was merely a change in form in the relationship between the bank and The First Securities Company, and that the Petitioner received nothing more than he had before. There was no change in the value of the Petitioner's stock holdings in the bank, nor was there any increase or increment in the value of his net worth as a result of this transaction, and we contend therefore that under those circumstances, there could be no realization of taxable income on such a transaction.

Now, we have a fourth contention, which is alternative, [7] and it brings into play quite some com-

plicated provision of the statute, and that's this, that should this transaction be recognized or construed as a dividend in kind of the stock of The First Securities Company, then the transaction would probably come within the provisions of the tax-free reorganization, distribution and exchange sections, a hundred and twelve B three and one hundred and twelve B eleven of the Revenue Code of 1939.

The facts as I have stated them, your Honor, are all set forth in the stipulation of facts, and that concludes my statement.

Mr. Picco: Now, counsel's statement of the facts is accurate, your Honor. I just want to add one or two other facts in that that may have some bearing, if you want to get the complete picture at the present time, and that is that the trust arrangement was authorized by the various beneficiaries of the trust, and that they had control over the trust—that is, the trustees, could not take any action without a majority of the beneficiaries acting. Moreover, by a majority vote, they could have this stock in the trust—the trust we raised—sold at any time they wanted to, so in that sense, whatever tie-up exists here was voluntary on the part of the beneficiaries themselves, and they at all times were in position and empowered to break up that tie-up, as I understand the facts.

Now, Respondent's position on the valuation issue [8] simply stated is this, that The First Securities Company is an investment company, it is not an operating company by any stretch of the imag-

ination. Respondent has determined that the stock of the company has value, is valuable, and that the fair market value is best measured by the underlying assets, which it has been stipulated have a fair market value of three hundred and ten thousand dollars.

On the principal issue, Respondent's position is that the transfer of the stock of this First Securities Company, on the particular date, January 20 of 1953, to the trustees, for the benefit of the stockholders of the bank, constituted a taxable distribution, that is, it constituted a dividend of the stock to the stockholders to the extent of the fair market value of the stock. Now, on this, there can be no question that the stock itself was severed from the assets of the bank. All rights that the bank had to the stock passed over at that time. Furthermore, immediately, the beneficial interest in the stock passed to the beneficiaries—to the stockholders of the bank. They now have an asset they never had before, and in addition to the beneficial interest, they also had effective control over the trust itself, as the trust issuance will show. The result of such a transaction, Respondent submits, is that it is a dividend of the stock to the bank stockholders.

Petitioner also, as he has mentioned, relies on the [9] spin-off provisions of Section a hundred and twelve B eleven, of the 1939 Code. It was apparent to Respondent that there is no reorganization in this case whatsoever. Furthermore, First Securities Company cannot really be called a party to any reorganization as required by the statutes. There may

be some question as to recapitalization, but again, it seems to me that it is going pretty far to call this a recapitalization, because it applies only—recapitalization applies only to the same entity and we have several entities here, including the trust.

The transaction, Respondent submits, does not meet the requirements of Section a hundred and twelve B eleven.

The Court: All right, that concludes the matter, gentlemen, I take it? I will set the usual sixty days for simultaneous briefs and thirty days for reply.

The Clerk: Those dates, gentlemen, are April 22nd and May 22nd.

(Whereupon, at 11:40 o'clock a.m., the hearing in the above-entitled matter was concluded.) [10]

[Endorsed]: T.C.U.S. Filed April 8, 1957.

29 T. C. No. 45

Tax Court of the United States

Earl R. Wilkinson and Grayce Wilkinson, Petitioners, v. Commissioner of Internal Revenue, Respondent.

Docket No. 61977. Filed December 6, 1957.

OPINION

A national bank, in which petitioner was a stockholder, owned all the shares of a subsidiary which performed functions related to the bank's activities. An order of the Comptroller of the Currency made

it necessary for the bank to divest itself of this stock. A plan was devised whereby the bank transferred the stock to trustees, who were to hold legal title to such stock with a beneficial interest in the stockholders of the bank. The stockholders received nothing to evidence their beneficial interest in this trustee stock. The beneficial interest was locked in with the bank stock, and it could not be disposed of separately from the bank stock.

Held, the transfer by the bank of its subsidiary's stock to the trustees did not constitute a taxable dividend to the petitioner.

George H. Koster, Esq., for the petitioners.

John D. Picco, Esq., for the respondent.

Opinion

Mulroney, Judge: Respondent determined a deficiency in the petitioners' income tax for the year 1953 in the amount of \$109.38.

The sole question in the case is whether petitioner, a stockholder in a banking corporation, received a taxable dividend by virtue of a transaction wherein the bank transferred stock which it owned in a securities company, to trustees, for the benefit of all the bank stockholders.

All of the facts have been stipulated and they are hereby found accordingly. Petitioners Earl R. Wilkinson and Grayce Wilkinson, husband and wife, are residents of Portland, Oregon. They filed a joint income tax return for the taxable year 1953 with the district director of internal revenue at

Portland, Oregon. Earl R. Wilkinson will hereinafter be referred to as the petitioner.

In 1953 petitioner was a stockholder in the First National Bank of Portland, hereinafter called the Bank, holding 1,103 shares of the capital stock of said Bank. The Bank was organized in 1865 under the National Banking laws. On January 20, 1953, it had outstanding 1,200,000 shares of common stock with a par value of \$12.50 per share.

The First Securities Company, hereinafter called Securities, was incorporated on April 7, 1919 under the laws of Oregon. In 1931 the Bank acquired all of the capital stock of Securities and the latter remained a wholly-owned subsidiary of the Bank until January 20, 1953. On that date Securities had 500 shares of stock outstanding. Securities performed functions which the Bank itself was not able to perform under the National Banking laws, such as the liquidation of assets acquired by First National through foreclosures on loans, the purchase of residence properties for rental to employees of the Bank, and the acquisition of other property which the Bank itself could not acquire but which would inure to its interest. Its assets on January 20, 1953 consisted of cash, contracts and loans receivable, stocks and bonds, assigned life insurance policies, and real estate. The fair market value and the adjusted book value of the net assets of Securities on January 20, 1953 was \$310,000. The income of Securities in 1953 consisted of rentals, interest, dividends, and gain from the sale of properties. The

earnings and profits of Securities for the year 1953 exceeded \$350,000.

At the regular annual meeting of the shareholders of the Bank held on January 20, 1953, the shareholders took action with regard to Securities stock, as recorded in the minutes of said meeting, wherein they approved a plan to have the Bank transfer all of the shares of Securities to the five directors of the Bank acting as trustees, under a trust instrument, for the pro rata benefit of the stockholders of the Bank. Immediately after the stockholders' meeting the directors of the Bank held a directors' meeting and took action as recorded in the minutes of said meeting, directing the transfer of the 500 shares in Securities to the named Bank directors as trustees under the trust instrument prescribed by the resolution of the stockholders' meeting. On the same date the trust instrument was executed between the Bank and the trustees and the stock in Securities was transferred thereunder to the trustees. The trust instrument provided, in part, as follows:

1. Said shares of stock shall be held by the Trustees as joint tenants and not as tenants in common. The Trustees may and shall exercise all the rights, powers and privileges of absolute owners of said stock, including, but not limited to, the right to vote the same for any purpose whatsoever, to receive and receipt for any and all dividends, liquidating or otherwise, to sell, assign or transfer said stock or any portion thereof or any interest therein or any proceeds or other assets of any kind

derived therefrom, provided that any action so taken, whether in the election of Directors, the sale or other disposition of the assets of this trust or otherwise, shall have been first authorized by beneficiaries owning at least a majority of the beneficial interests in the assets of this trust, or such other percentage as may be hereinafter prescribed, evidenced in the manner stated in this agreement.

2. (a) The beneficial interest in said shares of stock of The First Securities Company shall be and is vested ratably in all of the shareholders of the Bank (hereinafter sometimes referred to as the beneficiaries) in the same proportion as they shall from time to time own of record stock of said Bank.

(b) Such beneficial interests may be sold, transferred or assigned only by the ratable transfer upon the books of the Bank to the same transferees of the same proportionate number of shares of stock of the Bank itself, but such beneficial interests shall not be and are not capable of separate transfer or assignment, either voluntarily or involuntarily, or in any other manner or by any other means than that herein specifically prescribed.

(c) At any and all times when, as stockholders of the Company, the Trustees shall receive dividends either from the profits of the Company or from liquidating dividends, partial or final, or from the sale or other disposition of the stock of the Company, the Trustees shall distribute such dividends or cause the same to be distributed to the beneficiaries ratably in accordance with their respective interests in the assets of this trust, determined

in the manner prescribed by this agreement. If and when any dividends are declared by the Directors of the Company the Trustees may, instead of receiving and distributing them as herein provided, authorize and empower the Company to make such distribution direct to the beneficiaries in accordance with their respective interests therein, in which event the Trustees shall be relieved of further responsibility therefor.

* * * * *

6. Meetings of the beneficiaries may be called and held in the manner following:

* * * * *

(b) Meetings of the beneficiaries may be called by the Trustees at any time upon giving the notice hereinafter prescribed. Upon the written request of the then owners of record of at least ten per cent (10%) of the beneficial interests then outstanding, the Trustees shall call a meeting to be held at such time and place as they may deem appropriate, but at all events not more than thirty (30) days after receipt of such request. In the event of the failure, neglect or refusal of the Trustees so to do, the then owners of not less than ten per cent (10%) of the beneficial interests then outstanding shall be entitled to call the meeting by giving notice as hereinafter provided.

* * * * *

(d) Voting at such meetings may be in person or by proxy. Any number of persons beneficially interested hereunder, together owning a majority of the beneficial interests in the stock held in this

trust, who shall be present in person or represented by proxy at such meeting shall constitute a quorum for the transaction of business. The affirmative vote of the persons present, in person or represented by proxy, owning at least a majority of the beneficial interests in the stock held hereunder shall be necessary for the transaction of all business and for the adoption of all resolutions, except where a different percentage vote is prescribed hereunder.

* * * * *

7. (a) This trust or the terms and conditions of this agreement may be amended, modified or terminated at any time by the affirmative vote of the then owners of not less than ninety per cent (90%) of the outstanding beneficial interests in the assets of this trust. Such vote shall be at a meeting of the beneficiaries called and held in the manner hereinbefore provided. Such amendment, modification or termination shall become and be effective thirty (30) days after the date of the meeting of beneficiaries at which the favorable affirmative vote was taken.

* * * * *

(c) In the event of termination of said trust the assets contained therein shall be promptly distributed by the Trustees to the then beneficiaries of the trust, comprising all of the stockholders of the Bank on the effective date of termination of the trust, on a pro rata basis in proportion to their ownership of beneficial interests in the trust.

No papers were distributed to the stockholders of the Bank evidencing their beneficial interest in

the stock of Securities. The stockholders received nothing they could dispose of separately from the stock of the Bank. No notation was made on the Bank stock certificates evidencing a beneficial interest in the stock of Securities.

Respondent determined the foregoing transaction constituted the distribution to the petitioner and the other Bank stockholders, of a dividend in kind, consisting of all of the stock in Securities within the meaning of section 115 (a) of the Internal Revenue Code of 1939,¹ on the basis of a fair market value of Securities' stock on January 20, 1953 of \$310,000, which determination accounts for the deficiency involved.

Petitioner did not include any amount in his income for 1953 on account of this transfer by the Bank of Securities stock to the trustees. Petitioner's argument is that the transfer did not result in any income to him because such transfer "effected merely a change in form in one of petitioner's investments but did not separate or liquidate that investment, nor did it afford any possibility for the realization of any monetary or proprietary gain of any kind", and that, in any event, even if such transfer were deemed to be a distribution of property to the petitioner, there would be no tax consequences because the property so distributed had no fair market value. In the alternative, petitioner argues that the effect of the trans-

¹ All section references are to the Internal Revenue Code of 1939, as amended, unless otherwise noted.

action of January 20, 1953 was either (1) a non-taxable spin-off within the meaning of section 112 (b) (11), or (2) a nontaxable exchange under section 112 (b) (3).

It is the substance of a transaction that determines whether a corporate distribution constitutes a dividend. And the liability of a stockholder for income tax on a corporate distribution depends basically upon whether that distribution constitutes income to him. *Coudon v. Tait*, 56 F. 2d 208. In *United States v. Phellis*, 257 U.S. 156, it was pointed out: "The liability of a stockholder to pay an individual income tax must be tested by the effect of the transaction upon the individual." Income is something that comes to a taxpayer so the basic question is whether the receipt by petitioner of the beneficial interest in Securities stock increased his income for that year. We hold it did not and the transaction did not amount to a dividend distribution taxable to petitioner.

The device here involved seems to be a plan often put forward by banking corporations to allow a bank's shareholders to take advantage of what the bank feels is proper banking business, which the bank as an entity cannot avail itself of. It accomplishes all of the advantages of a subsidiary for the bank without the usual shareholding of a subsidiary. But the adoption of the plan of trusteeing the stock of the corporation and locking the beneficial interest in the stock to the bank shares, results in no realization of income to the bank shareholders when the stock in the corporation

was formerly owned by the bank. The share of bank stock represents to the bank shareholder substantially the same beneficial ownership in the same assets both before and after the transaction.

The plan in the instant case was adopted to meet the requirements of the Comptroller of the Currency. It was a plan whereby the Bank would rid itself of Securities, its wholly owned subsidiary, and still retain for its stockholders the benefits that had resulted from its being a Bank subsidiary. Evidently such a transfer satisfied the requirements of the Comptroller but a realistic look at the transaction shows that to all intents and purposes Securities was retained by the Bank as an available medium to perform the same auxiliary business functions as were performed by it before the transfer.

From the Bank stockholders' position, it is difficult to see how any change resulted from the transfer that gave rise to the realization of gain. Petitioner's investment was, in substance, exactly the same after the transaction as before. Before the transaction petitioner's investment and the investment of all the Bank shareholders, might be said to be direct ownership of the stock of the Bank and solely by reason of such ownership, indirect ownership of the stock of Securities. After the transfer petitioner and the other Bank shareholders had the same investment, namely, direct ownership of the Bank stock and solely by reason of such ownership, indirect or beneficial ownership of the stock of Securities. While in form there was a severance of

Securities stock from the Bank assets, the petitioner and the other stockholders in the Bank received nothing they did not have before, as a result of the transaction. The beneficial ownership of the stock of Securities, after the transaction, was still locked into ownership of the Bank stock. It was still a pro rata interest depending upon ownership of the Bank stock. That beneficial interest could not be transferred without transfer of the Bank stock. If, the day after the transfer, petitioner had sold his Bank stock, he would have transferred substantially the same investment as to Securities stock as if the transfer had been made the day before.

Respondent cites a line of cases where a bank has declared a cash dividend, or a dividend consisting of surplus assets, which by agreement of the bank's shareholders was paid over to trustees for the purpose of organizing a corporation to transact business in which the bank could not engage. There, too, the stock in the new corporation was to be held in trust for the bank's shareholders, and its disposition was tied to existing stock ownership in the bank. Respondent cites *John G. Lonsdale*, 11 B.T.A. 659, affirmed 32 F. 2d 537, certiorari denied 280 U.S. 575; *Mrs. Frank Andrews*, 26 B.T.A. 642; *Walter Hopkins*, 27 B.T.A. 1331; and *Sara A. Twohy*, 34 B.T.A. 444.

The foregoing cases are not in point. There the income is realized by the payment of the cash dividend to or for the bank shareholder. The fact that, by prior agreement the shareholder's cash dividend was diverted to the purchase of stock, was imma-

terial. As said in *Lonsdale v. Commissioner*, 32 F. 2d 537 (affirming *John G. Lonsdale*, 11 B.T.A. 659):

Appellant [bank shareholder] received a distinct individual gain by the declaring of the dividend in question. The fact that he did not receive the cash in hand, but permitted the cash dividend thus declared to be used in the purchase of stock in another distinct corporation, did not alter the substantial effect of the transaction; * * *

In the above cited cases the bank shareholder received something new that was purchased with his cash dividend. Here what the Bank shareholder received was substantially the same beneficial interest in Securities stock that he had before the distribution.

Petitioner cites *Moore v. Hoey*, 31 F. Supp. 478; *DeCoppet v. Helvering*, 108 F. 2d 787, affirming *Andre DeCoppet*, 38 B.T.A. 1381; and *Commissioner v. Hagerman*, 102 F. 2d 281, affirming 34 B.T.A. 1158. These are cases where substantially the same plan as here was employed by banks to secure an arrangement for an investment affiliate. There the bank stock carried with it the ratable beneficial interest in trustee stock for an investment company dealing in securities that were unlawful for banks. There, as here, the bank directors were the trustees and the stock in the investment company was in the name of the trustees, with the beneficial interest in the bank shareholders. This

beneficial interest could not be transferred separately and it was automatically transferred with the transfer of the bank stock. In these cases it was held no deductible loss was realized by a bank shareholder where his beneficial interest in the investment company was extinguished with its dissolution with no assets to distribute in liquidation. While the question was quite different in the above cited cases, the principle on which the decisions rest is of interest here. The general principle laid down in the cited cases is that bank stock and the beneficial interest in the investment company represented a "single" investment and if there were any differences between the trustee plan and the usual shareholding of a subsidiary they were merely formal. As Judge Learned Hand said in *DeCoppet v. Helvering*, *supra*: "For all purposes except conformity with banking requirements the result was, however, substantially the same as though the Bank itself held the shares." The formal legal differences that exist between the usual shareholding of a subsidiary and the trustee shareholding here involved are unimportant when the inquiry is whether the transfer shall be deemed a taxable transaction for the shareholder. Where the transfer to the trustee is made under an agreement which limits the rights and privileges of the shareholders of the bank to substantially the same rights as to the stock of the bank's subsidiary as existed before the transfer, no taxable dividend to them occurs by reason of the transfer.

Respondent makes much of the point that the

trust agreement provides no action can be taken by the trustees without the consent of a majority of the holders of the beneficial interests. This, respondent argues, shows that the stock was in effect transferred from the Bank to the Bank's stockholders who thereby became free to control the stock. This same argument was rejected in *DeCoppet v. Helvering*, *supra*, where the Court said:

The beneficial interest was as much an appurtenance of the bank shares as an easement is of the servient tenements; it merely gave them an added value, precisely as it would have done, had the Bank been the shareholder. Collectively the same persons must always be equitable owners of the investment shares and shareholders of the Bank, and in the same proportion; there never could be one group holding bank shares, and another holding investment shares. So far as a corporation is the aggregate of its shareholders in respect of their collective rights and obligations, there was but one corporation.

We do not see why the situation was different because the bank shareholders could modify the trust by a two-thirds vote, if the trustees agreed; and could terminate it by a three-fourths vote, if they did not. * * *

The authority of the Bank shareholders as beneficiaries was no greater than the authority which they possessed with reference to the Securities stock when it was held as an asset of the Bank. The

Bank shareholders by collective action of a majority could have controlled the Securities stock when it was an asset of the Bank, though the exercise of that power might be limited to the election of a new board.

The Bank and its stockholders had the right, for good business reasons, to impose restrictions on the transfer which would render it no more than formal; which would leave the Bank stockholders substantially the same rights in the transferred stock as they held before. As long as that kind of a transfer satisfied the Comptroller, the whole purpose of the transfer was accomplished. But such a transfer involves no change in substance as to the rights of the petitioner as a Bank shareholder in the Bank asset transferred, which could be an occasion for determining a taxable gain. We hold the transfer of Securities stock of January 20, under the Trust Agreement did not result in a distribution by the Bank of a dividend in kind.

Our holding for petitioner eliminates the necessity for our considering the issue as to the market value of Securities stock on the date of the transfer, and the alternate arguments made by petitioner that if he did receive a dividend distribution, it was a nontaxable distribution within the provisions of section 112 (b) (11) or a nontaxable exchange of securities under section 112 (b) (3).

Decision will be entered for the petitioners.

Served and Entered December 6, 1957.

The Tax Court of the United States
Washington

Docket No. 61977

EARL R. WILKINSON and GRAYCE WIL-
KINSON, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Opinion, filed December 6, 1957, it is Ordered and Decided: That there is no deficiency in petitioners' income tax for the year 1953.

Entered December 6, 1957.

/s/ JOHN E. MULRONEY,
Judge.

Served and Entered December 10, 1957.

In the United States Court of Appeals
for the Ninth Circuit

T. C. Court Docket No. 61977

COMMISSIONER OF INTERNAL REVENUE,
Petitioner on Review,

vs.

EARL R. WILKINSON and GRAYCE WIL-
KINSON, Respondents on Review.

PETITION FOR REVIEW

The Commissioner of Internal Revenue hereby

petitions the United States Court of Appeals for the Ninth Circuit to review the decision entered by the Tax Court of the United States on December 6, 1957, ordering and deciding that there is no deficiency in taxpayers' income tax for the calendar year 1953.

Taxpayers filed a joint income tax return for the year 1953 with the Director of Internal Revenue at Portland, Oregon, whose office is within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

Nature of Controversy

In 1953, taxpayer, Earl R. Wilkinson, was a shareholder in the First National Bank of Portland. The Bank owned all of the stock of The First Securities Company, a corporation organized under the laws of Oregon. The First Securities Company performed functions which the Bank itself was unable to perform under the National Banking laws. On January 20, 1953, the shareholders approved a plan pursuant to which the Bank transferred all of the shares of The First Securities Company to trustees under a trust instrument for the benefit of the shareholders of the Bank.

The Commissioner of Internal Revenue determined that by reason of the foregoing transaction the shareholders of the Bank received a taxable dividend in kind equal to the fair market value of the stock transferred to the trust. The Commissioner determined that the fair market value of the corporation's stock was \$310,000 on January 20,

1953, and that it had earnings and profits in excess of that amount. A deficiency was asserted against the taxpayer based on his pro rata share of the distribution.

The Tax Court held that taxpayer, as a shareholder of the Bank, did not receive a dividend, within the meaning of section 115(a) of the Internal Revenue Code of 1939 by reason of the aforesaid transaction.

/s/ CHARLES K. RICE, CAR,
Assistant Attorney General,

/s/ ARCH M. CANTRALL, CAR,
Chief Counsel, Internal Revenue Service, Counsel
for Petitioner on Review.

Of Counsel: Charles P. Dugan, Special Attorney,
Internal Revenue Service.

[Endorsed]: T.C.U.S. Filed March 3, 1958.

[Title of Court of Appeals and Tax Docket No.
61977.]

NOTICE OF FILING PETITION
FOR REVIEW

To: George H. Koster, Esquire, 300 Montgomery
Street, San Francisco 4, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 3rd day of March, 1958, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for

the Ninth Circuit of the decision of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 3rd day of March, 1958.

/s/ ARCH M. CANTRALL, CAR,
Chief Counsel, Internal Revenue Service, Counsel
for Petitioner on Review.

Acknowledgment of Service Attached.

[Endorsed]: T.C.U.S. Filed May 13, 1958.

[Note: Item 12 is the same as Item 11 except it is addressed to Mr. Earl R. Wilkinson and Mrs. Grayce Wilkinson, 4535 S. W. 78th Avenue, Portland, Oregon.]

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 14, inclusive, constitute and are all of the original papers on file in my office as called for by the "Designation of Contents of Record on Review", including Joint exhibits 1-A thru 15-O, attached to the Stipulation of Facts, in the case before the Tax Court of the United States docketed at the above number and in which the

In The United States Court of Appeals
For The Ninth Circuit

No. 16031

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

EARL R. WILKINSON and GRAYCE WILKIN-
SON, Respondents.

STATEMENT OF POINTS TO
BE RELIED UPON

The Commissioner of Internal Revenue submits the following statement of points upon which he intends to rely as the basis of the petition for review:

That the Tax Court of the United States erred:

1. In failing to hold and decide that the transaction in question constituted a distribution to the taxpayer, as a stockholder of the First National Bank of Portland, of a dividend in kind within the meaning of Section 115(a) of the Internal Revenue Code of 1939.

2. In failing to hold and decide that the property distributed to the taxpayer by the bank, as a dividend in kind, had a fair market value and therefore that the taxpayer realized gain taxable as ordinary dividend income to him.

3. In holding and deciding that as a result of the transaction in issue, the taxpayer as stockholder of the bank received no monetary or proprietary gain of any kind.

4. In holding and deciding that there is no deficiency in the taxpayers' income tax for the year 1953.

5. In failing to hold and decide that there is a deficiency in income tax for the year 1953 in the amount of \$109.38.

Dated: June 10, 1958.

/s/ CHARLES K. RICE,
Assistant Attorney General,
Attorney for the Petitioner.

[Endorsed]: Filed June 12, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STIPULATION

It is hereby stipulated and agreed between the parties to the above-entitled proceeding, through their respective counsel, that, subject to the approval of the Court, in lieu of designating portions of the exhibits in this case for inclusion in the printed transcript, the parties will print as a part of their briefs the exhibits, or pertinent portions thereof, that they respectively rely on.

/s/ CHARLES K. RICE,
Assistant Attorney General,
Attorney for Petitioner.

/s/ GEORGE H. KOSTER,
Attorney for Respondents.

[Endorsed]: Filed June 14, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF MATERIAL
PORTIONS OF THE RECORD

In accordance with Rule 17(6) of the Rules of the United States Court of Appeals for the Ninth Circuit, the Commissioner of Internal Revenue, petitioner herein, by his counsel, hereby designates the following portions of the record in the above-entitled case as material to the consideration of the petition for review, and requests that they be included in the record to be printed in this case:

1. Docket Entries.
2. Petition.
3. Answer.
4. Amended Answer.
5. Stipulation of Facts.
6. Transcript of Proceedings in the Tax Court, pages 2 through 10.
7. Findings of Fact, Opinion and Decision of the Tax Court.
8. Notice of Filing Petition for Review.
9. Petition for Review.
10. Statement of Points to be Relied Upon.
11. This Designation.

Dated: June 10, 1958.

/s/ CHARLES K. RICE,
Assistant Attorney General,
Attorney for the Petitioner.

[Endorsed]: Filed June 12, 1958. Paul P. O'Brien, Clerk.

